

UNREPORTED CASES

INTRODUCTION

UNREPORTED CASES is a continuing feature of the DELAWARE JOURNAL OF CORPORATE LAW. Select unreported cases of a corporate nature that have not been published by a reporter system are included. The Court of Chancery's opinions and memorandum opinions are printed in their entirety, exactly as received.

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Re: *State of Delaware, Department of Finance v. Univar, Inc.*
C.A. No. 2018-0884-JRS

Dear Counsel:

Plaintiff, the Delaware Department of Finance (the "Department" or the "State"), has statutory authority to audit Delaware corporations to assess their compliance with Delaware's unclaimed property law. Defendant, Univar, Inc. ("Univar"), received a notice of examination regarding unclaimed property from Brenda Mayrack, the State Escheator, in 2015. It has declined to comply with the examination, igniting litigation in this Court and the United States District Court for the District of Delaware (the "District Court"). The proceedings in this Court concern

the State's attempt to enforce an administrative subpoena compelling Univar to produce certain corporate books and records.

Univar has moved to dismiss, arguing this case is not ripe for adjudication because the State has failed to satisfy the statutory prerequisites for enforcing a subpoena. The State responds that, to the extent there are such prerequisites, they have been satisfied and this case is ripe for adjudication. After carefully weighing the parties' arguments, I am convinced Univar has not met its burden of demonstrating, as a matter of law, that the claims asserted here are not ripe. Its Motion to Dismiss, therefore, must be denied.

I. BACKGROUND

I have drawn the facts from the well-pled allegations in the Complaint and documents incorporated by reference or integral to the Complaint.¹ "Any additional facts [discussed here] are either not subject to reasonable dispute or subject to judicial notice."²

A. *The Parties and Relevant Non-Parties*

Plaintiff, the Department, is charged with enforcing Delaware's unclaimed property law.³ Brenda Mayrack, the State Escheator, performs her function as a representative of the Department.

Defendant, Univar, is a Delaware corporation.⁴ It received a notice of an unclaimed property examination from the State on December 11, 2015.⁵

¹Citations to the Complaint are to "Compl. ¶ ____." See *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 (Del. 2004) (noting that on a motion to dismiss, the Court may consider documents that are "incorporated by reference" or "integral" to the complaint). I also take judicial notice of the court record in companion litigation pending in the United States District Court for the District of Delaware (*Univar, Inc. v. Geisenberger*, C.A. No. 1:18 Civ. 01909). See *Frank v. Wilson*, 32 A.2d 277, 280 (Del. 1943) (taking judicial notice of court record in companion litigation when addressing a motion to dismiss); *Orloff v. Shulman*, 2005 WL 3272355, at *12 (Del. Ch. Nov. 23, 2005) (same).

²*Cedaryview Opportunities Master Fund, L.P. v. Spanish Broadcasting Sys., Inc.*, 2018 WL 4057012, at *1 (Del. Ch. Aug. 27, 2018).

³Compl. ¶ 3; 12 Del. C. § 1102. In this Opinion, I use "escheat law" and "unclaimed property law" interchangeably.

⁴Compl. ¶ 1.

⁵Compl. ¶ 9.

B. *The Escheat Law*

Delaware's escheat law allows the State to acquire title to abandoned property if, after the statutory waiting period, no rightful owner appears.⁶ Until the property is claimed, the State may (and does) use the funds in its operating budget.⁷ Large sections of Delaware's escheat law were struck down as unconstitutional by court order in 2016 (the "Old Law").⁸ Apparently in response to the *Temple-Inland, Inc.* decision, the escheat law was substantively amended in 2017 (the "New Law").⁹

Delaware's recovery of unclaimed property is facilitated by the priority rules set forth by the United States Supreme Court in *Texas v. New Jersey*.¹⁰ There, the court explained that only one state may escheat unclaimed property.¹¹ The first priority goes to the state of the owner's last known address.¹² When, as often is the case, that address is unknown, the second priority, in the entity context, goes to the state where the holder is incorporated.¹³ Because so many business organizations call Delaware home, our state often has priority to escheat unclaimed property held by those entities.¹⁴

As an entity incorporated in Delaware, Univar is a potential holder of unclaimed property under the New Law.¹⁵ As such, the New Law, like the Old Law, authorizes the State Escheator to "[e]xamine the records of a person or the records in the possession of an agent, representative, subsidiary, or affiliate of the person under examination in order to determine whether the person complied with [the Escheat Law]."¹⁶ Delaware utilizes an agent, Kelmar Associates LLC ("Kelmar"), to perform audits to investigate whether entities are complying with Delaware law.¹⁷ As a part of this auditing procedure, the New Law, unlike the Old Law, authorizes the State to issue administrative subpoenas that can direct a company to turn over corporate books and records to Kelmar.¹⁸

⁶See 12 Del. C. §§ 1130, *et seq.* This property often takes the form of bank accounts, stocks or unused gift cards.

⁷See *Univar, Inc. v. Geisenberger*, 409 F. Supp. 3d 273, 276 (D. Del. 2019).

⁸See *Temple-Inland, Inc. v. Cook*, 192 F. Supp. 3d 527 (D. Del. 2016).

⁹See 8 Del. C. §§ 1101, *et seq.*

¹⁰379 U.S. 674 (1965).

¹¹*Id.* at 677.

¹²*Id.* at 681–82.

¹³*Id.* at 682.

¹⁴Federal Complaint ¶ 20.

¹⁵Compl. ¶ 2; 12 Del. C. § 1130(9).

¹⁶Compl. ¶ 4 (quoting 12 Del. C. § 1171(1)).

¹⁷Compl. ¶ 10.

¹⁸Compl. ¶¶ 6, 10.

C. Procedural History

As noted, the State sent an examination notice to Univar in late 2015.¹⁹ Kelmar sent its first document request to Univar on September 23, 2016.²⁰ Since then, Univar has declined to cooperate with the State's audit and has refused to produce any documents in response to Kelmar's requests.²¹

On October 30, 2018, the State issued an administrative subpoena, pursuant to 12 Del. C. § 1171(3), directing Univar to provide responsive documents by December 3, 2018.²² Again, Univar did not comply and, instead, filed an action in the District Court challenging the New Law's constitutionality.²³

The State responded by filing its Complaint in this Court seeking a summary order enforcing its subpoena. Specifically, the Complaint seeks an Order under 12 Del. C. § 1171(4) requiring Univar to comply with the State's administrative subpoena.²⁴

Defendant moved to dismiss or stay this action on January 11, 2019, in favor of the first-filed federal action.²⁵ On April 8, 2019, this Court granted the motion to stay upon concluding that the statute granting the State subpoena power, at issue in this litigation, was among the statutory provisions Univar was challenging as unconstitutional in the first-filed federal action.²⁶ On September 17, 2019, the District Court granted in part and denied in part the State's Motion to Dismiss.²⁷ In doing so, the court determined that Univar had stated a claim that the State has violated its due process and equal protection rights.²⁸ The court also held many of Univar's claims were not ripe, and stayed that case while this Court decides whether to enforce the State's subpoena as a matter of Delaware law.²⁹

Univar has now moved to dismiss this action, arguing the State's claim is not ripe for adjudication because the State has failed to comply

¹⁹Compl. ¶ 9.

²⁰Compl. ¶ 10.

²¹Compl. ¶ 11.

²²Compl. ¶ 13.

²³Compl. ¶ 14; see *Univar*, 409 F. Supp. 3d at 273.

²⁴Compl. ¶ 7. See 12 Del. C. § 1171(4) ("The State Escheator . . . may . . . [b]ring an action in the Court of Chancery seeking enforcement of an administrative subpoena issued under paragraph (3) of this section, which the Court shall consider under procedures that will lead to an expeditious resolution of the action.").

²⁵D.I. 6.

²⁶D.I. 32; *State of Del., Dep't. of Fin. v. Univar, Inc.*, C.A. No. 2018-0884-JRS (Del. Ch. Apr. 8, 2019) (TRANSCRIPT) (D.I. 35).

²⁷*Univar*, 409 F. Supp. 3d at 273.

²⁸*Id.* at 282–84.

²⁹*Id.* at 284–85.

with the statutory prerequisites for issuing a subpoena.³⁰ It also argues it has preserved all constitutional arguments that are properly before the District Court, and that this Court need not address any constitutional issues when deciding the State's entitlement to enforce its subpoena.³¹

II. ANALYSIS

"Ripeness, the simple question of whether a suit has been brought at the correct time, goes to the very heart of whether a court has subject matter jurisdiction."³² "Courts in [Delaware] decline to exercise jurisdiction over cases in which a controversy has not yet matured to a point where judicial action isappropriate."³³ This measured approach both preserves limited judicial resources and ensures an orderly development of the law.³⁴

At oral argument, Univar made clear that its ripeness defense is predicated on two points. First, it argues the State has not adequately demonstrated its compliance with the New Law's confidentiality provisions, a necessary prerequisite to any audit.³⁵ Second, it argues the State has not promulgated sufficient regulations to manage multistate audits fairly, as required by the New Law.³⁶ Separately, the parties dispute whether Univar has preserved, and may present to the District Court, its constitutional arguments with respect to the subpoena under *England v. Louisiana State Board of Medical Examiners*.³⁷ I address each argument below.

³⁰Opening Br. in Supp. of Def. Univar's Mot. to Dismiss ("OB") 2.

³¹Reply Br. in Supp. of Def. Univar's Mot. to Dismiss ("RB") 16–22.

³²*Bebchuck v. CA, Inc.*, 902 A.2d 737, 740 (Del. Ch. 2006).

³³*Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 479 (Del. 1988).

³⁴*Id.*

³⁵Oral Arg. on Def.'s Mot. to Dismiss ("OA")13; OB 16–20.

³⁶OA 13; OB 20–23. While Defendant argued in its briefs that this action was unripe because the State has not made a determination whether the Old Law or New Law applies, it candidly acknowledged at oral argument that the State has made that determination and has communicated as much to Univar within the body of the subpoena at issue here. OA 13, 17. Univar also argued in its opening brief that this Court would have no power to enforce its order with respect to the subpoena, rendering any decision on the State's claim here an advisory opinion. OB 25–28. It appeared to back off that argument in its reply brief and at oral argument. OA 19. In any event, I am satisfied that nothing about the New Law in any way restricts this Court's inherent contempt power. See *DiSabatino v. Salicete*, A.2d 1344, 1348 (Del. 1996) ("Courts have 'an inherent contempt authority, . . . as a power necessary to the exercise of others.'") (quoting *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 831 (U.S. 1994)). If the Court were to order Univar to respond to the State's subpoena, and Univar were to refuse to comply with that order, the Court would have several coercive options at its disposal to compel compliance.

³⁷375 U.S. 411 (1964) (addressing constitutional abstention).

A. *This Action is Ripe for Adjudication*

As noted, Univar maintains this action is not ripe because the State has not demonstrated its compliance with the New Law's confidentiality requirements for multistate audits.³⁸ In this regard, Univar maintains that the audit being conducted by the State is a multistate audit, notwithstanding the State's insistence that it is conducting a "Delaware-only" audit.³⁹ Univar then argues that, because the public records laws of the other states participating in this supposed multistate audit materially conflict with the confidentiality requirements of the New Law, this action will not be ripe for decision until the State demonstrates its full compliance with Delaware's confidentiality requirements.⁴⁰

I am not persuaded. First, there is no basis to conclude as a matter of undisputed fact that the State is conducting a multistate audit.⁴¹ More to the point, even if the State were conducting a multistate audit, Kelmar is bound by Delaware law not to share any of Univar's confidential information with "any person who is not a current officer or employee of [Delaware]. . . ."⁴² This Court has the authority, backed by its inherent contempt powers, to order that any books and records Univar produces in response to the subpoena be subject to a confidentiality order that complies with (and imposes) Delaware law.⁴³ Such an order could include, for example, a provision prohibiting the Kelmar auditors who receive Univar's information pursuant to the Delaware subpoena from sharing that information with others, including other Kelmar auditors.

Univar next argues that the State has failed to demonstrate it has promulgated regulations that will allow it to ensure that the New Law is being enforced as intended.⁴⁴ Here again, I disagree. Section 1172 of the New Law empowers the Department of Finance to promulgate regulations.⁴⁵ The State has written a number of rules and regulations pursuant to that statutory grant of rule-making authority.⁴⁶ Nothing in the

³⁸OA 8; 12 Del. C. §§ 1181, 1189.

³⁹OB 16–20; RB 12–16.

⁴⁰OB 16–20; 12 Del. C. § 1189.

⁴¹AB, Ex. A.

⁴²12 Del. C. § 1189(a). Violation of the New Law's confidentiality provisions is a misdemeanor, with the Superior Court having "exclusive original jurisdiction over such misdemeanor." 12 Del. C. § 1189(d).

⁴³See generally *Hallett v. Carnet Hldg. Corp.*, 809 A.2d 1159, 1162 (Del. 2002) (noting that the court has inherent authority to enter appropriate confidentiality orders); *In re Trust for Gore*, 2011 WL 13175994, at *1 (Del. Ch. Dec. 22, 2010) (same).

⁴⁴OB 20.

⁴⁵12 Del. C. § 1172(e).

⁴⁶See OB, Ex. A.

New Law, however, sets some qualitative or quantitative regulatory threshold against which the State's authority to enforce its administrative subpoenas should be measured. While Univar may not like the number or content of regulations that have been promulgated, that does not mean this case is unripe. Any gap that might exist in the regulations can easily be filled by the well-developed common law standards in Delaware for enforcing subpoenas.⁴⁷ When the question of the subpoena's enforceability is called, this Court can and will look to that body of law.

B. *The District Court Should Decide Any Issues Concerning Abstention Doctrines*

The State argues that, having moved to dismiss this action, Univar should be forced, here and now, to litigate the facial challenges it has mounted to the New Law, and its failure to do so in its Motion should result in a declaration from this Court that those challenges have been waived.⁴⁸ The State acknowledges that it would then take that declaration to the District Court, drop it in on the district judge's proverbial lap and argue—presumably with the intent to suggest issue or claim preclusion—that the abstention issues have already been decided.⁴⁹ For its part, Univar denies it has raised a facial challenge to the statute in the current action, and maintains that all constitutional issues were properly presented to, and preserved for argument in, the District Court.⁵⁰

Given that a ruling by this Court that the subpoena was not enforceable as a matter of Delaware law would moot certain claims in the federal action, the District Court understandably deemed it appropriate to stay that case pending adjudication of this case.⁵¹ In doing so, the District Court acknowledged that asking this Court to rule on the subpoena's enforceability before addressing Univar's constitutional claims would

⁴⁷The parties have not pointed to any Delaware authority that provides guidance on the standards for enforceability of a subpoena specifically under the unclaimed property law. But there is abundant authority with respect to the parameters for enforcement of administrative subpoenas generally. *See, e.g., State v. Salasky*, 2013 WL 5487363, at *14–15 (Del. Super. Sept. 26, 2013) (discussing the Attorney General's statutory subpoena power under 29 Del. C. §§ 2505(4), 2508(a)); *U.S. v. Powell*, 379 U.S. 48, 57–58 (1964) (Finding an administrative subpoena is enforceable when "the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the [agency's] possession, and that the administrative steps required by the [law] have been followed . . .").

⁴⁸AB 33–38; OA 32.

⁴⁹OA 32.

⁵⁰RB 16–21; OA 45–51.

⁵¹*Univar*, 409 F. Supp. 3d at 284.

bring "certain abstention doctrines [] into play."⁵² The District Court further noted "that according to Supreme Court precedent certain issues may be preserved for adjudication in federal courts if those issues are explicitly noted and deliberately avoided during state court litigation."⁵³

Nothing in the District Court's opinion suggests the court there intended that this Court would adjudicate whether either party has properly preserved its constitutional arguments under *England*, much less that this Court would actually decide constitutional issues that are clearly at the heart of the federal litigation. Indeed, the State has pointed to no authority where a Delaware state court took it upon itself to decide whether a party had preserved constitutional arguments for presentation in a federal court. In my view, that decision is properly left to the District Court.⁵⁴ My reading of the District Court's opinion is that the presiding judge there shares that view.⁵⁵

Having determined that the State has stated a justiciable claim for enforcement of its subpoena under the New Law, the next step is to present the claim for decision on the merits promptly. With this in mind, the parties shall confer and submit a joint or, if they cannot agree, separate proposed case scheduling order(s) within the next ten (10) days.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Joseph R. Slights III

⁵²*Id.* at 285.

⁵³*Id.* at 285 n.5 (citing *England*, 375 U.S. at 420).

⁵⁴See *Temple of Lost Sheep Inc. v. Abrams*, 930 F.2d 178, 183 (2d Cir. 1991) (federal court ruling that a plaintiff was precluded from asserting its federal claims); *Lupin Pharm., Inc. v. Richards*, 2015 WL 4068818, at *4 (D. Md. July 2, 2015) (federal court determining it should abstain).

⁵⁵*Univar*, 409 F. Supp. 3d at 285. This is not to say that Univar will be prohibited from making arguments that narrowly implicate constitutional considerations when addressing, on the merits, whether the State's administrative subpoena is enforceable. See *In re Blue Hen Country Network, Inc.*, 314 A.2d 197, 200 (Del. Super. 1973) (noting that the State's subpoena must comply with the Fourth Amendment).

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Re: *CHS/Community Health Systems, Inc. and CHSPSC, LLC v.
Steward Health Care System LLC*
C.A. No. 2019-0165-JRS

Dear Counsel:

This breach of contract action arises out of an Asset Purchase Agreement, dated February 16, 2017 (the “APA”), in which Defendant, Steward Health Care System LLC (“Steward”), acquired substantially all of the assets of eight hospitals indirectly owned by Plaintiff, CHS/Community Health Systems, Inc. (“CHS”).¹ In their Third Amended Complaint (“Complaint”), CHS and its affiliate, CHSPSC, LLC (“CHSPSC”), allege Steward is in possession of certain assets that “belong to CHS[] as Excluded Assets” under the APA.² Additionally, CHS and CHSPSC allege that Steward has breached its obligation to assume certain contractual liabilities, leaving CHSPSC to satisfy those liabilities at a cost of more than \$3,000,000.³ CHS and CHSPSC assert three claims in their

¹ See Third Am. Compl. (“Compl.”) (D.I. 42) ¶ 6; Ex. 1 to the Decl. of Kevin M. Regan in Supp. of Steward Health Care Sys. LLC’s Opening Br. in Supp. of its Partial Mot. to Dismiss Pls.’ Third Am. Compl. (D.I. 49) (the “APA”).

²Compl. ¶¶ 9, 11 (alleging Steward has “received at least \$1,031,920.85 in accounts receivable . . . belonging to CHS/CHSI and/or its affiliates”).

³See Compl. ¶¶ 18, 22–23.

Complaint that are relevant here. In Count II, CHS and CHSPSC allege Steward must indemnify them under the APA.⁴ Alternatively, in Counts III–IV, CHSPSC brings a claim for unjust enrichment against Steward "to the extent CHSPSC . . . lacks standing to claim indemnity under the terms of the APA."⁵

Steward has filed a Partial Motion to Dismiss Counts II–IV under Court of Chancery Rule 12(b)(6) (the "Motion").⁶ According to Steward, Count II must be dismissed (but only as to CHSPSC) because CHSPSC "lacks standing to assert a breach of the APA."⁷ Alternatively, if CHSPSC does have standing to sue for indemnity under the APA, then the unjust enrichment claims asserted in Counts III– IV must be dismissed because "[a] claim for unjust enrichment will not lie where there is a contract that governs the relationship between the parties."⁸

After careful review of the relevant contract language, I am satisfied the APA is ambiguous as to whether CHSPSC has standing to sue for indemnity as a third- party beneficiary. Because the APA is ambiguous, it cannot be determined on the pleadings whether "an express, enforceable contract that controls" CHSPSC's relationship with Steward actually exists.⁹ For this reason, at this stage, neither the indemnification claim in Count II nor the unjust enrichment claims in Counts III and IV can be dismissed. Steward's Motion is DENIED.

I. BACKGROUND

On February 16, 2017, CHS and Steward signed the APA whereby Steward agreed to purchase substantially all the assets of certain hospitals owned by CHS.¹⁰ Specifically, the APA lists a series of "Seller Entities"

⁴Compl. ¶¶ 21–48.

⁵Compl. ¶¶ 49–60.

⁶Def.'s Partial Mot. to Dismiss (D.I. 43). The Complaint also asserts breach of contract under the APA in Count I and breach of contract under a so-called "AP Side Letter" in Count V. Those claims are not subjects of the Motion.

⁷Steward Health Care Sys. LLC's Opening Br. in Supp. of its Partial Mot. to Dismiss Pls.' Third Am. Compl. (D.I. 48) ("DOB") at 5.

⁸DOB at 9 (quoting *Kuroda v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 891 (Del. Ch. 2009)).

⁹See *Kuroda*, 971 A.2d at 891 ("A claim for unjust enrichment is not available if there is a contract that governs the relationship between the parties," but this rule only applies if there is an "express, *enforceable* contract that controls the parties' relationship.") (emphasis supplied).

¹⁰APA (recitals). I draw the facts from the allegations in the Complaint, documents incorporated by reference or integral to that pleading and judicially noticeable facts. See *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 (Del. 2004) (quoting *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995)) (noting that on a motion to dismiss, the court may consider documents that are "incorporated by reference" or "integral" to the complaint); D.R.E. 201–02 (codifying Delaware's judicial notice doctrine).

that would "sell to [Steward] . . . substantially all of [their] assets . . . which are . . . used in connection with . . . [a] 'Healthcare Business.'"¹¹ Among the "Assets" Steward acquired were "all rights, title and interest in and to" certain "Assumed Contracts" listed in the APA's schedules.¹²

Related to its purchase of the Healthcare Business, Steward agreed to "assume . . . the future payment and performance of . . . all obligations accruing . . . after the Effective Time with respect to the Assumed Contracts."¹³ In Section 11.1, captioned "Indemnification by Buyer," Steward also promised to "defend, indemnify and hold harmless [CHS] and its Affiliates . . . from and against any and all Losses" incurred in connection with any of the Assumed Contracts.¹⁴ In turn, the APA defines a party's "Affiliates" to include "any other Person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such specified person."¹⁵

According to the Complaint, CHSPSC is an "Affiliate" of CHS.¹⁶ CHSPSC is *not*, however, among the "Seller Entities."¹⁷ Even though CHSPSC is neither a party to the APA nor one of the Seller Entities, CHSPSC has paid ~\$3,000,000 to satisfy contractual obligations that it believes meet the definition of "Assumed Liabilities" under the APA—meaning they should have been paid by Steward.¹⁸

To recoup these expenditures, CHSPSC brings Count II against Steward for indemnification under Section 11.1.¹⁹ Specifically, CHSPSC seeks to hold Steward to its promise to "indemnify . . . CHS and its Affiliates" (i.e., CHSPSC) for Losses incurred "in connection with" the Assumed Contracts.²⁰ CHSPSC brings this claim, not as a party to the APA, but as an "intended third-party beneficiary."²¹

In the Motion, Steward argues CHSPSC lacks standing to sue for indemnification under Section 11.1.²² In support of this argument, Steward cites Section 12.22 of the APA, which states:

¹¹APA (Recitals clause D).

¹²APA § 1.1(h) (discussing the "Assumed Contracts"); Compl. ¶ 12.

¹³APA § 1.3(a).

¹⁴APA § 1.3(a) (defining "obligations . . . with respect to the Assumed Contracts" as "Assumed Liabilities"), § 11.1 (the indemnification provision) (emphasis supplied).

¹⁵APA § 12.18.

¹⁶Compl. ¶¶ 5–6, 25.

¹⁷See APA Ex. A (listing the "Seller Entities").

¹⁸Compl. ¶¶ 18, 21–23.

¹⁹Compl. ¶¶ 41–48.

²⁰Compl. ¶¶ 41–48.

²¹Compl. ¶ 44.

²²DOB at 5.

The terms and provisions of this Agreement are intended solely for the benefit of [CHS], [Steward], their Affiliates and their respective permitted successors or assigns, and it is not the intention of the parties to confer, and this Agreement shall not confer, third-party beneficiary rights upon any other person other than the Seller Entities and the Buyer Entities, which the parties agree are express third party beneficiaries of the rights of Seller and Buyer, respectively.²³

The crux of the parties' dispute centers on whether Section 12.22 allows CHSPSC to enjoy third-party beneficiary status.

II. ANALYSIS

The standard for deciding a Motion to Dismiss under Court of Chancery Rule 12(b)(6) is well-settled:

- (i) all well-pleaded factual allegations are accepted as true;
- (ii) even vague allegations are 'well-pleaded' if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and (iv) dismissal is inappropriate unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof.²⁴

Because this case presents legal issues surrounding the "proper interpretation of language in a contract,"²⁵ the Court may address these issues at the motion to dismiss stage if "the language of [the] contract is plain and unambiguous."²⁶ Contract language is ambiguous "only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."²⁷ Dismissal is appropriate when the defendant's interpretation is the only reasonable construction as a matter of law and that construction reveals that the plaintiff cannot sustain an actionable claim.²⁸ On the other hand,

²³APA § 12.22.

²⁴*Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002) (citation omitted).

²⁵*Allied Capital Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1030 (Del. Ch. 2006) (noting that issues of contract interpretation present questions of law).

²⁶*Id.*

²⁷*AT&T Corp. v. Lillis*, 953 A.2d 241, 252 (Del. 2008) (quotations omitted).

²⁸*Caspian Alpha Long Credit Fund, L.P. v. GS Mezzanine P'rs 2006, L.P.*, 93 A.3d 1203, 1205 (Del. 2014); *Kahn v. Portnoy*, 2008 WL 5197164, at *3 (Del. Ch. Dec. 11, 2008).

if the plaintiff has proffered a reasonable construction upon which its claim of breach rests, the motion to dismiss must be denied.²⁹

As stated above, the parties proffer conflicting constructions of the APA. Under CHS and CHSPSC's reading, the APA extends "third-party beneficiary" status to CHSPSC.³⁰ Steward disagrees and contends the "only" reasonable interpretation of the APA is that "CHSPSC is not an intended third-party beneficiary."³¹ Under Delaware law:

To qualify as a third party beneficiary of a contract, (i) the contracting parties must have intended that the third party beneficiary benefit from the contract, (ii) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (iii) the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract.³²

Of these elements, only the first (intent to benefit) and third (intent to benefit must be a material purpose of the contract) are in dispute.

In support of its construction, CHSPSC emphasizes that Section 11.1 extends an indemnification right to CHS "and its Affiliates."³³ Along similar lines, CHSPSC underscores language in Section 12.22 that "the terms . . . of this Agreement are intended *solely* for the benefit of [] [CHS and its] *Affiliates*."³⁴ And, as noted, CHSPSC is alleged to be a CHS Affiliate.³⁵

Given that the APA must be read "as a whole," giving "each provision and term effect so as not to render any part of the contract mere surplusage," I am satisfied CHSPSC's reading is reasonable because it gives independent meaning to Sections 11.1 and 12.22.³⁶ Specifically, this reading ascribes meaning to the first clause of Section 12.22, where the parties appear to agree that the APA is "intended" to benefit CHS's "Affiliates."³⁷ If CHS's affiliates are *not* among the APA's intended

²⁹*Caspian*, 93 A.3d at 1205.

³⁰Compl. ¶¶ 42, 44.

³¹DOB at 6.

³²*Comrie v. Enterasys Networks, Inc.*, 2004 WL 293337, at *3 (Del. Ch. Feb. 17, 2004) (internal quotation omitted).

³³APA § 11.1.

³⁴APA § 12.22 (emphasis supplied).

³⁵Compl. ¶ 25.

³⁶*Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage.").

³⁷APA § 11.1.

beneficiaries, it is difficult to divine from the face of the agreement what purpose the parties had for the first clause of Section 12.22. Stated differently, if only the "Seller Entities" (as Steward argues) are third-party beneficiaries, then the second clause of Section 12.22 (discussed below) would have been sufficient to convey that intent.³⁸

On the other hand, Steward's interpretation of the APA is also reasonable. Steward emphasizes the second clause in Section 12.22, where the parties stated, "it is not the intention of the parties to confer, and this Agreement shall not confer, third-party beneficiary rights upon any other person other than the Seller Entities. . . ."³⁹ Because, as Steward argues, the Seller Entities are all "Affiliates" of CHS as that term is used in the APA, the only way to ascribe independent meaning to the second clause in Section 12.22 is to read it as limiting the universe of CHS "Affiliates" entitled to third party beneficiary status (i.e., only the "Seller Entities").⁴⁰ If all CHS "Affiliates" have third-party beneficiary standing, then the second clause in Section 12.22 adds nothing.

The upshot is that both parties' proffered constructions have a surplusage problem.⁴¹ CHSPSC's reading renders the second clause in Section 12.22 surplusage, while Steward's reading fails to give meaning to the first clause in that same provision. This reflects ambiguity. Because the parties have presented "differing—but reasonable—interpretations of" the APA, the Court must turn to "extrinsic evidence to understand the parties' agreement" which "cannot proceed on a motion to dismiss."⁴² Steward's Motion must be denied as to Count II.

Given that the indemnification claim in Count II may or may not be viable, it is uncertain at this stage whether there exists an enforceable contract that "governs the relationship between" Steward and CHSPSC.⁴³ Accordingly, it is reasonably conceivable that CHSPSC may yet demonstrate it is entitled to relief under the unjust enrichment claims asserted in Counts III–IV.⁴⁴ Until the Court construes the scope and

³⁸See DOB at 6–7.

³⁹APA § 12.22; DOB at 6.

⁴⁰See APA § 12.18 (defining an entity's "Affiliates"), APA Ex. A (listing the "Seller Entities"); DOB at 7.

⁴¹*Osborn*, 991 A.2d at 1160 (noting that Delaware courts will strive to "read a contract as a whole and . . . give each provision and term effect so as not to render any part of the contract mere surplusage").

⁴²*Renco Gp., Inc. v. MacAndrews AMG Hldgs. LLC*, 2015 WL 394011, at *5 (Del. Ch. Jan. 29, 2015).

⁴³*Kuroda*, 971 A.2d at 891.

⁴⁴See *S'holder Representative Servs. LLC v. RSI Holdco, LLC*, 2019 WL 2207452, at *6 (Del. Ch. May 22, 2019) ("The mere existence of a breach of contract claim will not automatically foreclose pursuit of an unjust enrichment claim" where a "plaintiff pleads a right to recovery" that may not be "controlled by contract."); *Narrowstep, Inc. v. Onstream Media*

meaning of the relevant (and ambiguous) provisions of the APA, it is impossible to assess the legal merits of any of the claims subject to the Motion.

For the foregoing reasons, the Motion must be DENIED.

IT IS SO ORDERED.

Very truly yours,

/s/ Joseph R. Slights III

Corp., 2010 WL 5422405, at *16 (Del. Ch. Dec. 22, 2010) (stating that a breach of contract claim will foreclose an unjust enrichment claim only where "a contract comprehensively governs the parties' relationship").